

Comments

WILL PROFESSIONAL ATHLETES CONTINUE TO CHOOSE THEIR REPRESENTATION FREELY? AN EXAMINATION OF THE ENFORCEABILITY OF NON-COMPETE AGREEMENTS AGAINST SPORTS AGENTS

Jason Gershwin †

I. INTRODUCTION

To put it simply, professional athletes can do a lot. Barry Bonds hit seventy-three home runs in a baseball season.¹ Tiger Woods won four major golf championships in a row.² Jerry Rice has scored 202 touchdowns.³ Lance Armstrong came back from advanced testicular cancer to win four straight Tour de France races.⁴ Alex Rodriguez signed a record-breaking \$252 million contract to play baseball.⁵ Michael Jordan has won six National Basketball Association (“NBA”) Championships,

† J.D. Candidate, 2003, University of Pennsylvania; BBA, 2000, Emory University Goizueta Business School. Special thanks to Buck Briggs, Associate Counsel for the NFL Management Council, and Scott Rosner, Lecturer, Legal Studies, University of Pennsylvania Wharton School, for all of their help with this piece. Thanks also to Mom, Dad, Marisa and Andrea for their constant love and support.

1. See Don Cronin, *Giants give Bonds five-year, \$90M deal*, USA TODAY, Jan. 15, 2002, at C1.

2. See Bob Harig, *The Masters: Tiger's foursome*, ST. PETERSBURG TIMES, Apr. 9, 2001, at 1A.

3. See Mike Vaccaro, *Ageless and Timeless*, N.Y. POST, Jan. 10, 2003, at 128; see also *Jerry Rice Career Statistics*, at <http://sports.espn.go.com/nfl/players/stats?statsId=126> (2003). Jerry Rice has scored 192 receiving touchdowns and 10 rushing touchdowns in his career.

4. See *Easiest Rider Stunning rivals with his strength, Lance Armstrong barely pants as he wins in France*, PEOPLE, Aug. 12, 2002, at 68. As of the date of this article, Lance Armstrong has won the last four Tour de France titles.

5. See T.R. Sullivan, *Yankees' 'Boss' berates Rangers over A-Rod contract*, FORT WORTH STAR-TELEGRAM, Feb. 18, 2001.

owned an NBA team, come out of retirement twice, and created his own brand.⁶ And Shaquille O'Neal found enough time to be one of the fifty greatest players in NBA history, star in movies, record multiple rap albums, and train to become a sheriff.⁷ Yet, in an era when professional athletes have become larger than life, these same multi-million dollar phenomena of sport might soon find that they cannot do something that until now they have always been able to: choose their own sports agents.

In the sports management business, there have been and continue to be a glut of sports agents who compete fiercely for athlete clients. In fact, nearly one thousand agents currently represent players in the National Football League ("NFL").⁸ However, while agent competition promises to remain intense, the changing economics of the player representation business might soon threaten an athlete's right to freely select any agent he or she desires.

The potential problem can be traced to the rapid consolidation that took over the athlete representation business during the 1990s. Companies like SFX Entertainment ("SFX"), Assante Corporation ("Assante"), International Management Group ("IMG"), and Octagon all bought out smaller sports agencies and agents to create "super agencies," offering a multitude of services to a wide array of athletes.⁹ With many of the top agents seemingly switching allegiances through all of the consolidation, the larger agencies in the industry have attempted to protect themselves by including non-compete clauses in their employment agreements with agents.¹⁰ Should these restrictive covenants be deemed enforceable against sports agents, it could have a huge effect on the athlete agency industry and, ultimately, spell the end of professional athletes' right to select their agents without restriction.

The purpose of this comment is to examine the changing business of sports agencies and inquire as to how the potential enforceability of non-compete agreements contained within agents' employment contracts might change the entire industry.

Part I of the comment introduces the player representation business and athletes' longstanding right to choose their agents freely. Part II

6. See Steve Wyche, *Jordan will Return, Play for Wizards*, WASHINGTON POST, Sept. 24, 2001, at D1; Bruce Horovitz, *Marketers Drool Over a Jordan return: NBA star's encore would be a slam-dunk for brands*, USA TODAY, Apr. 11, 2001, at 1B.

7. See Shaquille O'Neal and Andrea N. Whittaker, *The Big Man: Shaquille O'Neal Has Big Thoughts About Greatness and the Lakers' New Season*, SPORTS ILLUSTRATED FOR KIDS, Nov. 2001, at 31.

8. See Joyzelle Davis, *Real-Life breakup of 'Jerry Maguire' agency mirrors movie*, HOUSTON CHRONICLE, Aug. 12, 2001, at 2.

9. See Adam Rubin, *Gobbling Up Agents & Players*, DAILY NEWS, Feb. 8, 2001, at 78.

10. See Complaint for Damages and Injunctive Relief at 16, Steinberg Moorad & Dunn, Inc. v. Dunn (C.D. Cal. 2001)(No. 01-07009).

explores the athlete-agent relationship and how those relationships have been affected by agent regulation. Part III further examines agent competition and industry consolidation with an in-depth analysis of the challenges that plagued the SFX Sports Group during its tumultuous consolidation effort.

Part IV provides a detailed look at the recently decided courtroom battle between super-agents Leigh Steinberg and David Dunn, in which a Los Angeles jury determined that Dunn breached his employment contract and non-compete agreement after having left his longtime partner.¹¹ Part V inspects the contrasting state laws on non-compete agreements and whether the Steinberg/Dunn jury ruled consistently with California's longstanding precedent. Finally, this comment concludes with a discussion of the pending appeal in the Steinberg/Dunn dispute and with an assessment of the impact enforceable non-compete agreements would likely have on sports agents and the players they represent.

II. THE AGENT-ATHLETE RELATIONSHIP

The relationships athletes share with their agents have been characterized differently. Some claim that the success of an athlete's career depends largely on his or her selection of the right agent;¹² however, others maintain that "the problem [facing professional sports] now is how to protect the player from the agent."¹³ Nonetheless, the ideal scenario remains one in which the athlete and his or her agent can foster a strong, trusting and long-lasting relationship so that both can be successful.¹⁴ A dependable agent can make the athlete's life easier both on and off the field of play.

A. *Services Agents Provide for Their Clients*

Traditionally, sports agents were hired by athletes to fulfill the single task of negotiating contracts with professional sports teams.¹⁵ However, as the business of professional sports has changed, so, too, has the role of the sports agent. Today there is a lot more money to be made in sports than there was just five or ten years ago, as contract values have skyrocketed

11. See Liz Mullen, *Steinberg's victory could be deterrent*, STREET & SMITH'S SPORTSBUSINESS J., Nov. 25-Dec. 1, 2002, at 1, 43.

12. See Charles B. Lipscomb and Peter Titlebaum, *Selecting a Sports Agent: The Inside for Athletes and Parents*, 3 VAND. J. ENT. L. & PRAC. 95, 97 (2001).

13. Bryan Couch, Comment, *How Agent Competition and Corruption Affects Sports and the Athlete-Agent Relationship and What Can Be Done to Control It*, 10 SETON HALL J. SPORT L. 111, 124 (2000).

14. *Id.*

15. See Lipscomb, *supra* note 12, at 99.

and lucrative endorsement opportunities abound.¹⁶ Even amidst the recent economic downturn, corporations continue to salivate over the idea of having high-profile athletes as part of their marketing campaigns.¹⁷ These added opportunities for athletes have required agents to handle more than mere representation during contract negotiations.

To remain competitive in the marketplace, today's agents must provide an array of services, including managing the athlete's income, securing lucrative endorsement deals, providing estate and tax planning advice, and offering career and personal counseling.¹⁸ Furthermore, some agents have even set up charitable organizations for their clients,¹⁹ while others have prepared elaborate 60-page booklets to lure potential suitors when their clients are up for free agency.²⁰ Ultimately, the modern sports agent's job is centered on his or her ability to eliminate as many, if not all, of the countless outside distractions that confront athletes, thereby allowing the stars to focus on just playing the game.²¹

B. *The Regulation of Sports Agents*

Without regulation, sports agents would cause problems for collegiate athletes, their own clients, and even themselves. Consequently, the players' associations from the four major professional sports leagues, the National Collegiate Athletic Association ("NCAA"), and many state legislatures have adopted regulations governing athlete agents.²²

In 1983, the National Football League Players Association ("NFLPA") became the first professional sports players' association to set

16. See Jerry Brewer, *The Free-Agent Frenzy*, ORLANDO SENTINEL, Jul. 18, 2001, at C6.

17. See Alby Gallun, *Tiger's Tale Leaves Titleist Twisting; Nike Turns Up Heat on Fortune Brands Unit*, CRAIN'S CHICAGO BUSINESS, Dec. 17, 2001, at 3 (Nike is planning a January rollout of its new line of golf clubs and plans to use Tiger Woods as a large part of its marketing plan; Nike signed Mr. Woods to a five-year, \$100 million endorsement contract last year).

18. See Lipscomb, *supra* note 12, at 99.

19. See Alastair Goldfisher, *Scoring with Athletes: Noted Sports Agent Leigh Steinberg Has Made a Career Out of Asking His Famous Sports Star Clients to Show Him the Money and Donate to Charity*, CAL. CEO, (Apr. 2001), available at http://www.californiaceo.com/archive/0401/giving_back.htm.

20. See Anthony McCarron, *Agent: A-Rod will stay a shortstop, chills Yankees hopes*, N.Y. DAILY NEWS, Nov. 7, 2000 (discussing how Scott Boras, the agent for then-free-agent shortstop Alex Rodriguez, prepared the thick 60-page booklets on A-Rod with career projections and more for the Major League Baseball teams that expressed an interest in signing A-Rod to a contract).

21. See Couch, *supra* note 13, at 112.

22. See Robert N. Davis, *Exploring the Contours of Agent Regulation: The Uniform Athlete Agents Act*, 8 VILL. SPORTS & ENT. L.J. 1, 2 (2001).

forth guidelines regulating agent activities.²³ The NFLPA Regulations outline the certification process that agents must complete to negotiate contracts on behalf of NFL players, the standard of conduct for agents, the standard contract form that must be entered into by agents and players, the schedule for arbitration proceedings, and more.²⁴

Following the NFLPA's lead, the players' associations of the other three professional sports leagues (NBA, MLB, and National Hockey League ("NHL")) have also utilized their legal status as the exclusive bargaining representatives for the athletes in their leagues to establish rules to monitor the agents.²⁵ The leagues' regulations share many commonalities: all require annual registration, annual payment of fees, mandatory attendance at annual seminars, and the use of standard form contracts that govern relationships between agents and their clients.²⁶ While union regulation is great in theory, one major criticism has been that sanctions have rarely been levied upon agents. In fact, in the twelve years and seven years after the inception of the NFLPA Regulations and the NBA's scheme respectively, penalties have been imposed in only three cases.²⁷

Though the NCAA cannot regulate sports agents because of a lack of jurisdiction, some of the NCAA's guidelines between student-athletes and other individuals are directly targeted at the athletes' relationships with agents.²⁸ More specifically, the NCAA prohibits student-athletes from executing contracts or accepting gifts from sports agents.²⁹

In addition to the players' associations and the NCAA, at least twenty-nine state legislatures have stepped in and enacted statutes regulating athlete agents since 1981.³⁰ At least 15 of these states require that agents register and pay a fee to the respective states.³¹

Florida was the first state to require agents to take a test on the laws applicable to player agents working in Florida.³² Typical of many of the statutes, California's legislation limits the allowable conduct between agents and student-athletes and prohibits agents from offering money or

23. *Id.*

24. See *National Football League Players Association Regulations Governing Contract Advisors*, 639 PLI/PAT 611 (2001).

25. See Lipscomb, *supra* note 12, at 98.

26. See Jamie P.A. Shulman, *The NHL Joins In: An Update on Sports Agent Regulation in Professional Team Sports*, 4 SPORTS LAW. J. 181, 204 (1997).

27. *Id.* at 205.

28. See Diane Sudia and Rob Remis, *The History Behind Athlete Agent Regulation and the 'Slam Dunking of Statutory Hurdles'*, 8 VILL. SPORTS & ENT. L.J. 67, 74 (2001).

29. *Id.*

30. *Id.*

31. See Couch, *supra* note 13, at 131.

32. *Id.*

any other benefit of value to a student-athlete.³³ Though they all attempt to achieve a common goal of regulating athlete agents, the state statutes are not uniform and do not provide for reciprocal registration, renewal, or enforcement.³⁴

Thus, the NCAA asked the NCCUSL to draft a uniform act. The result was the Uniform Athlete Agents Act ("UAA"), to which the NCCUSL recently gave its final approval.³⁵ The UAA's main goal is to standardize the varied and complicated legislation currently in effect in twenty-nine states.³⁶ To accomplish this, the UAA provides easier registration requirements for agents who have already registered in another state within the previous six months, a fee system that requires lower fees for renewal licenses and licenses issued under reciprocity, and a provision that contemplates criminal liability for nonconforming agents.³⁷

The UAA, however, leaves it up to each individual state to determine whether the crime constitutes a felony or a misdemeanor.³⁸ The UAA has yet to be adopted by all fifty states; thus, the attempt to replace confusing state legislation that differs in substance and results with a uniform set of guidelines has yet to be fulfilled.

Even if the UAA were to someday be universally adopted, problems with agent regulation would still remain. Serious gaps, such as attorney agents being subject to more extensive regulation than non-attorney agents, still persist.³⁹ Furthermore, cynics argue that regulation is needed beyond the proposed UAA, fearing that corruption among athlete agents will continue to be a problem until the professional sports leagues and the states promulgate strong enough regulations to deter wrongdoing.⁴⁰

III. AGENT COMPETITION AND INDUSTRY CONSOLIDATION

The struggle over the enforceability of non-compete agreements against agents has escalated over the past couple of years largely because of the heightened competition that consolidation has brought to the industry. Competition between player representatives has always been fierce; however, the recent rash of buyouts has certainly added fuel to the fire.

33. *Id.*

34. *See Davis, supra note 22.*

35. *See Sudia, supra note 28, at 69.*

36. *Id.* at 91.

37. *Id.* at 82-84.

38. *Id.* at 84.

39. *See Couch, supra note 13, at 132.*

40. *Id.* at 137.

A. *The Early 1990s*

The landscape of the sports management industry has changed since the early 1990s. Competition for athlete clients began to grow dramatically when Proserv, a then-large sports management firm founded by Donald Dell, underwent internal divisions that, in turn, led to several newly formed agencies.⁴¹ Many of the former Proserv executives started firms of their own, usually taking their athlete clients with them.⁴² Proserv received its biggest blow when David Falk and his high-profile clients, including Michael Jordan, left the firm in 1992.⁴³ As Proserv struggled, its competitors, including smaller niche firms and chief rival IMG, thrived.

IMG, a steadily growing juggernaut, reshaped the industry, as the firm acted on its strategy to “sign[] the biggest athletes in every country, tap[] into their clients’ events, and practically invent[] the made-for-TV sports event.”⁴⁴ As IMG grew larger and stronger, smaller agencies could no longer compete. So, while IMG flourished, the only firms that could threaten its dominance were a small group of “super agencies,” which were formed through consolidation.⁴⁵ SFX, Assante, and Octagon all bought out smaller agencies and agents to create these super agencies, offering a variety of services to a wide array of athletes.⁴⁶ Thus, formerly competing firms like Tellem & Associates, Hendricks Management Company, Falk Associates Management Enterprises (“FAME”), and The Marquee Group,⁴⁷ and formerly rival agents like David Falk, the Hendricks brothers, Arn Tellem, Jim Bronner, and Bob Gilhooley were now all on the same team and operating under the same corporate umbrella.

Though these newly formed super agencies seemingly benefited instantly from their ability to approach corporate sponsors with wider stables of athlete clients,⁴⁸ consolidation in the sports agency business also brought its share of problems.

B. *SFX – The Vision of a Mega-Firm*

Amid the consolidation frenzy among athlete representation firms in the late 1990s, the SFX Sports Group was by far the largest and most

41. *Id.* at 114.

42. *Id.*

43. *Id.*

44. *Id.* at 115.

45. *See* Rubin, *supra* note 9.

46. *Id.*

47. *See* Bappa Mukherji, *The New NBA Collective Bargaining Agreement; The changing role of agents in professional basketball*, 2 VAND. J. ENT. L. & PRAC. 96, 103 (2000).

48. *See* Rubin, *supra* note 9.

controversial player. The well-documented SFX saga, which has been labeled everything from an unabashed success to an overwhelming failure,⁴⁹ has made such a significant impact on the sports business world that the industry's leading publication, STREET AND SMITH'S SPORTSBUSINESS JOURNAL, recently devoted an elaborate four-part series to telling the story of this "sports business epic."⁵⁰

In total, SFX spent over \$350 million in cash, stock and assumed debt to form the SFX Sports Group, buying out twenty-one other sports marketing companies.⁵¹ Presently, the collective assets of the Group are likely worth nowhere near that much.⁵²

The ambitious concept of combining smaller companies and creating a sports marketing behemoth began with the vision of former Madison Square Garden president Bob Gutkowski.⁵³ The conceived mega-firm was created to compete with industry leader IMG and would be called the Marquee Group.⁵⁴ To establish credibility with investors, Gutkowski turned to radio mogul Bob Sillerman.⁵⁵ In December 1996, Sillerman helped launch an initial public offering to raise more than \$15 million to fund Marquee's acquisition of two already established sports firms: Athletes & Artists, headed by Art Kaminsky, and Sports Marketing and Television Inc., led by Mike Trager.⁵⁶ While the Marquee Group was to continue its consolidation of sports firms, the plan was for Sillerman to use some of his entertainment assets to form SFX Entertainment and subsequently begin combining concert promotion and live-event production firms.⁵⁷ Ultimately, the idea was for the Marquee Group and SFX Entertainment to merge into one entity.⁵⁸

From the beginning, there were problems. Attempting to run the Marquee Group, Kaminsky's and Gutkowski's personalities clashed.⁵⁹ Nonetheless, the consolidation strategy moved forward, and, in late 1997, Marquee spent nearly \$15 million to acquire the sports marketing firm ProServ.⁶⁰ To add to Marquee's growth, Sillerman ordered the company to

49. See Andy Bernstein, *Spotlight on SFX: Triumph or Tragedy? 'Synergy' Vision Never Came Together, but Firm Still Became Powerhouse*, STREET & SMITH'S SPORTSBUSINESS J., Dec. 2-8, 2002, at 1, 41-43.

50. *Id.* at 1.

51. *Id.* at 43.

52. *Id.*

53. See Andy Bernstein, *Vision of SFX fades to black: Gutkowski's idea of agency consolidation crumbles*, STREET & SMITH'S SPORTSBUSINESS J., Dec. 9-15, 2002, at 1.

54. *Id.* at 42.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

pursue athlete representation firms.⁶¹

Following up on Sillerman's request, Gutkowski sought out David Falk's FAME agency, a top-flight sports agency that represented the likes of Michael Jordan and other NBA stars.⁶² The only problem was that, according to Sillerman, Falk did not want his firm to be bought by Marquee.⁶³ Instead, Falk wanted to sell his firm to SFX and become the sports group's chairman.⁶⁴ Thus, in June 1998, SFX purchased FAME for about \$120 million in cash and stock.⁶⁵ Nearly a month later, Gutkowski sold Marquee to SFX for nearly \$150 million.⁶⁶

With FAME and Marquee already under its umbrella, the SFX Sports Group continued its consolidation rampage. In 1999, the company spent nearly \$18 million in cash and stock to acquire Integrated Sports International, a New Jersey-based firm headed by Frank Vuono.⁶⁷ Then, in the summer of 1999, SFX acquired the firms of Tellem & Associates, Hendricks Management Co., and Speakers of Sport, giving the Sports Group a number of prominent baseball and basketball agents.⁶⁸

The SFX Sports Group seemed to be fulfilling the vision set forth by both Gutkowski and Sillerman, as it had become a major player in the sports industry. For example, the firm sent the United States national women's soccer team on an indoor victory tour after its memorable triumph in the 1999 World Cup; negotiated Kobe Bryant's purchase of 50 percent of a professional Italian basketball team; wrestled tennis star Andre Agassi away from rival IMG; and expanded into stadium and arena naming rights, player endorsements, film and television and financial management.⁶⁹ Furthermore, as of February 2001, SFX represented 16 percent of all MLB players and 22 percent of NBA players.⁷⁰

C. *What Next? SFX Sells Out*

SFX appeared to be on top of the sports world, but all was not well within the firm's own walls. Tension among top executives grew, as clashing egos and posturing overtook the management team. Shortly after Marquee was acquired by SFX, Gutkowski was forced out by a power

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. See Bernstein, *supra* note 49.

66. See Bernstein, *supra* note 53, at 42.

67. See Bernstein, *supra* note 49.

68. *Id.*

69. *Id.*

70. See Rubin, *supra* note 9.

struggle with Falk.⁷¹ Furthermore, the likes of Vuono, Falk, and Curtis Polk, Falk's top agent at FAME, could not even agree on their job titles and management roles.⁷² Though SFX was spending millions to acquire smaller firms, many of its growing roster of high-profile employees became unsatisfied with their compensation and contract offers.⁷³

The largest blow to the Sports Group came, ironically, the morning after the firm's first company wide meeting in February 2000.⁷⁴ Though the employees had seemingly been reenergized only one day earlier following a series of heart-felt motivational speeches by all of the division presidents about the Group's future, no one, except maybe Falk, expected what would come next.⁷⁵ SFX had agreed to be acquired by Texas-based Clear Channel Communications, Inc. for nearly \$4.4 billion.⁷⁶ Everything became uncertain.

Clear Channel bought SFX primarily for its concert promotion business, so no one knew what would become of the Sports Group.⁷⁷ Vuono left and, without any major non-compete agreements in his way, began his own company again.⁷⁸ Then, the MLB and NHL Players Associations complained that a conflict of interest issue "arose because two pro-sports franchises ([baseball's] Texas Rangers and [hockey's] Dallas Stars) are owned by the vice-chairman of Clear Channel, Thomas O. Hicks, and one ([American football's] Minnesota Vikings) is controlled by a major shareholder, Red McCombs."⁷⁹ Yet another snag came when agents Jim Bronner and Bob Gilhooley, formerly of Speakers of Sport, filed suit against SFX, alleging that SFX fraudulently withheld information about the Clear Channel takeover.⁸⁰

With matters spinning out of control, new SFX CEO Brian Becker, at the suggestion of Falk, shook up the Sports Group in December 2000 with a major reorganization.⁸¹ Falk would head the athlete representation group and all of the marketing functions would be grouped under the larger SFX marketing group.⁸² Agents were put back in charge of their own divisions,

71. See Bernstein, *supra* note 49.

72. See Andy Bernstein, *Clash of Titans battered SFX: Ego and ambition led to executive battles, then departures*, STREET & SMITH'S SPORTSBUSINESS J., Dec. 16-22, 2002, at 1.

73. See Bernstein, *supra* note 49, at 42.

74. *Id.*

75. *Id.*

76. See Mark Hyman, *Sparks Fly at SFX*, BUS. WEEK, June 18, 2001, at 86.

77. See Bernstein, *supra* note 49.

78. See Bernstein, *supra* note 71, at 41.

79. See Hyman, *supra* note 76, at 86.

80. *Id.*

81. See Bernstein, *supra* note 49.

82. *Id.*

concentrating on their sports of expertise.⁸³ Remarkably, “[t]he cooperation that eluded the company in its early days . . . started to develop.”⁸⁴ Clear Channel even formed an internal unit called the “Synergy Group” in an effort to link its entertainment assets with sports and other former SFX holdings.⁸⁵ Apparently, Clear Channel has completed its “clean up” of the SFX/Marquee mess, as the media conglomerate recently “said it will fund expansion and acquisitions for the Sports Group once again.”⁸⁶

IV. STEINBERG V. DUNN

Lost in the SFX saga is the fact that, in April 2001, David Falk announced that he was voluntarily giving up his title as chairman of SFX Sports to spend more time with his family.⁸⁷ Upon his stepping down, questions lingered about the employment contract Falk signed when FAME was acquired by SFX. In return for his \$118 million, Falk agreed to work for SFX for five years and, “if he left before the deal expired, not to compete in the sports-agency [business] for one year.”⁸⁸

Though the question of whether such a non-compete agreement could be enforced against Falk never gained much public exposure, the recent feud between longtime partners and mega-agents Leigh Steinberg and David Dunn has brought the issue of restrictive covenants to the forefront of the sports industry.⁸⁹

A. Background

The ongoing drama between superstar agents Leigh Steinberg and David Dunn has been exceedingly ugly. Conflict first erupted when Dunn resigned from the agents’ firm, Steinberg, Moorad & Dunn, Inc. (“SMD”), on President’s Day in February 2001 to subsequently open his own agency, Athletes First.⁹⁰ In the aftermath of Dunn’s departure, Steinberg and Moorad filed suit against their former partner, alleging that Dunn and his newly formed firm conspired to lure away most of SMD’s clients.⁹¹ Dunn

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. See Davis, *supra* note 8.

90. See Liz Mullen, *Steinberg Was “Blown Away” By Employees’ Departure: Agent Acknowledges Flirtation with SFX, Frustration with Assante*, Oct. 5, 2002, at <http://www.sportsbusinessjournal.com>.

91. See Charlene Wilson, *Steinberg Sues Former Partner*, June 1, 2001, at

succeeded, as nearly 80 percent of SMD's eighty-six National Football clients had switched, or indicated that they intended to switch, firms by the end of August 2001.⁹²

A huge point of contention in the Steinberg/Dunn breakup, and the aspect of the case that most critically relates to the professional athletes' right of freely selecting their agents, is the twenty-four month non-compete clause contained within the employment agreement Dunn signed in 1999.⁹³ SMD claims that Dunn breached his employment agreement and the all-important non-compete clause, and thus SMD filed a complaint for "damages and injunctive relief for breach of contract, fraud, common law and statutory unfair competition, misappropriation of trade secrets, intentional interference with contract, intentional interference with prospective economic advantage, breach of fiduciary duty, [and] accounting and declaratory relief."⁹⁴

Dunn responded to the SMD suit with allegations of Steinberg's unethical and unprofessional behavior and claims of broken promises made to him during his employment at SMD.⁹⁵ As for his employment contract, Dunn claimed that "he was fraudulently induced into signing the agreement."⁹⁶

The drawn out, media-hyped saga between Steinberg and Dunn finally went to trial in the fall of 2002. On November 15, 2002, a Los Angeles jury ultimately ruled for Steinberg, awarding him a whopping \$44.66 million in damages.⁹⁷ Though Steinberg's courtroom victory has already sent shockwaves throughout the sports agency industry, the sections below provide an interesting look into the battle over, among other things, the enforceability of Dunn's non-compete agreement.

B. The Non-Compete Clause in Dunn's Contract

The critical issue in the dispute between Steinberg and Dunn was whether the restrictive covenant contained within Dunn's employment agreement would be deemed enforceable. On October 27, 1999, Dunn signed the contract, agreeing to be employed by Steinberg & Moorad, and subsequently by the Assante Group's subsidiary SMD after Assante's

<http://www.sportslawnews.com>.

92. See Davis, *supra* note 8.

93. *Id.*

94. Wilson, *supra* note 91.

95. See David Burkey, *Judge Grants Injunction in Steinberg Suit*, L.A. DAILY NEWS, Aug. 28, 2001, available at <http://www.sportslawnews.com>.

96. Liz Mullen, *Testimony Ends: Closing Arguments Set for Friday*, (Nov. 7, 2002), at <http://www.sportsbusinessjournal.com>.

97. See Liz Mullen, *Jury Awards Steinberg More Than \$44 Million*, (Nov. 25, 2002), at <http://www.sportsbusinessjournal.com>.

acquisition of SMD was finalized, for a term of five years.⁹⁸ In exchange for Dunn's promises to remain at SMD through at least 2004 and to refrain from competing against SMD for a period of twenty-four months after he ceased to be employed there, the agreement provided Dunn with a \$2 million signing bonus and further outlined yearly base salaries, profit sharing bonuses, and annual bonuses through the length of the term.⁹⁹ The deal further provided that the corporation of Steinberg & Moorad was to change its name to Steinberg, Moorad & Dunn and that Dunn would hold the title of "Executive Vice President" of SMD.¹⁰⁰

As part of the employment agreement, Dunn agreed to a lengthy series of restrictive covenants concerning the solicitation of SMD's existing, prospective, and future clients and employees.¹⁰¹ These non-compete clauses covered the full five years of the contract term plus the added twenty-four month period, and provided as follows:

[Dunn] shall not at any time during the [five-year] Term or during the [24-month] Post-Termination Non-Competition period, directly or indirectly, either individually or in partnership or jointly or in conjunction with any Person or Persons as principal, agent, shareholder or in any other manner whatsoever:

approach or solicit a Client or Prospective Client, with the intent to provide services or products to such Client or Prospective Client, render services to a client or Prospective Client, or attempt to direct away from [SMD] or the Assante Group any Client or Prospective Client or any known associate or affiliate of any Client or Prospective Client, on his own behalf or on behalf of any other Person with respect to business of any nature or kind which is competing with the business of the company or any Assante Group Business, or be associated with or advise any Person soliciting or servicing any Client or Prospective Client of [SMD] or the Assante Group whether or not [Dunn] served such Client or Prospective Client during the continuance of his employment by [SMD];

induce or attempt to induce any individual employed or otherwise engaged by [SMD] or the Assante Group to terminate his employment or engagement with [SMD] or such member of the Assante Group or hire any such employee;

solicit from a Client or Prospective Client of [SMD] or the Assante Group, or from any known associate of any Client or Prospective Client, any business of any nature or kind similar to

98. See Complaint, *supra* note 10, at 13.

99. *Id.* at 13-14.

100. *Id.*

101. *Id.* at 16.

the business of [SMD]; or

solicit, employ or utilize, in any manner whatsoever, the services of any individuals employed or otherwise engaged by [SMD] or the Assante Group.¹⁰²

C. Steinberg's Arguments Against His Former Protégé

Leigh Steinberg has, for a long time, been widely recognized as one of the top sports agents in the country.¹⁰³ He began his career representing Steve Barkowski in 1975, and his stable of clients since then has included several top NFL quarterbacks, such as Warren Moon, Troy Aikman and Mark Brunell.¹⁰⁴ In total, Steinberg and his firm, SMD, have negotiated over \$1 billion in NFL contracts for their clients.¹⁰⁵

To this day, Steinberg maintains that his great success is a result of a competitive advantage, which has been established through the investment of large amounts of resources, "including, but not limited to, money, employee and partner time, in developing and compiling Proprietary Information including, but not limited to, formulas, techniques, and methodologies which are neither known to the general public nor to other sports agencies. . . ."¹⁰⁶ In its legal briefs, SMD also argued that another essential component of its "Proprietary Information" is the large "amount of sensitive and confidential client information compiled over the years."¹⁰⁷ This information, the firm claimed, is used to both service current clients and to recruit new athletes.¹⁰⁸

In SMD's complaint, it was documented that Dunn joined the firm in 1991.¹⁰⁹ The firm maintained that Steinberg served as a mentor to Dunn both before and after he took Dunn on as partner, entrusted the firm's football clients to him, and, in 1999, changed the name of the firm to Steinberg, Moorad & Dunn.¹¹⁰ Throughout those years, SMD argued that Steinberg and the firm shared with Dunn "all of SMD's Proprietary Information."¹¹¹

When SMD agreed to merge into a new subsidiary of Assante in

102. *Id.* at 16-17.

103. See Mike Fish, *Following the Life of a Superagent*, COX NEWS SERVICE, Jan. 28, 2000.

104. See Complaint, *supra* note 10, at 10.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 11.

110. *Id.*

111. *Id.*

November 8, 1999, an important aspect of the merger became the employment agreement Dunn signed to remain at SMD.¹¹² It is this agreement that Dunn is accused of having broken with his resignation on February 16, 2001, and his subsequent launch of his new agency, Athletes First.¹¹³ SMD's complaint accused Dunn of using SMD's proprietary information to form his competing firm.¹¹⁴ SMD also noted that Dunn's actions constituted a willful and malicious misappropriation of trade secrets, in violation of the California Uniform Trade Secrets Act, California Civil Code § 3426.¹¹⁵ Furthermore, SMD alleged that a critical element to Dunn's scheme was an extortion plan, whereby Dunn and his conspirators threatened "to expose to the public certain alleged salacious and/or misleading details of the life of Mr. Steinberg so he, SMD, and Assante would refrain from enforcing SMD's rights with respect to SMD's valuable Proprietary Information."¹¹⁶

Though the conflict ultimately ended with the sizable damages award of \$44.66 million,¹¹⁷ SMD's complaint, at its heart, sought to enforce the employment agreement and its restrictive covenants against Dunn.¹¹⁸

D. *Dunn's Defense*

In court documents filed with the Superior Court of the State of California, Dunn's opposition to his former partner's Motion for a Preliminary Injunction revolved around five central arguments.¹¹⁹ Dunn contended that: (1) the employment agreement between SMD and him was not enforceable; (2) SMD's non-disclosure, non-competition and non-solicitation provisions were void against public policy and, therefore, unenforceable; (3) there were no trade secrets at issue; (4) he did not solicit the business of any SMD clients; and (5) SMD could not specifically enforce a personal services contract.¹²⁰

Amid Dunn's array of claims, his second argument is the one that squarely deals with the controversial issue of the restrictive covenant, which was contained in his employment agreement. Dunn asserted that, in California, such restrictive provisions, "which purport to restrict an

112. *Id.* at 12.

113. *Id.* at 54.

114. *Id.* at 27.

115. *Id.* at 63.

116. *Id.* at 28.

117. *See* Mullen, *supra* note 96.

118. *See* Complaint, *supra* note 10, at 55.

119. *See* Defendant David L. Dunn's Opposition to Plaintiff's Motion for a Preliminary Injunction at i, *Steinberg Moorad & Dunn, Inc. v. Dunn* (Cal. Super. Ct. 2001) (No. BC251379).

120. *Id.*

employee's ability to engage in direct competition with his/her former employer, are considered against public policy and void."¹²¹ Dunn cited California's Business and Professions Code Section 16600, which reads in pertinent part, "every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void."¹²² Dunn further alleged that the California courts have repeatedly chosen employee mobility over the competitive business interest of employers, and that SMD has "fundamentally misunderst[ood] this precept of California law."¹²³

Dunn also noted that, in California, unrestricted covenants not to compete are enforceable only when given by "someone selling the goodwill of a business (Business & Professions Code Section 16601) and a partner upon dissolution of the partnership (Business & Professions Code Section 16602)."¹²⁴ Dunn asserted that he was merely an employee, and not an owner of SMD, and, thus, the exceptions documented in Sections 16601 and 16602 were not applicable.¹²⁵

In the third of his five arguments, Dunn maintained that no trade secrets were at issue in this case.¹²⁶ Dunn claimed that SMD's "proprietary system" of recruiting and negotiating, information regarding the terms of its client contracts, and client identities and contact information all failed to meet the two-prong Uniform Trade Secrets Act ("UTSA") test.¹²⁷

E. Jury Awards \$44.66 Million to Steinberg, But Judge Refuses to Go Further

After nearly six weeks of courtroom wrangling, a Los Angeles federal court jury, on November 15, 2002, awarded more than \$44.66 million to Steinberg, "including \$20 million in actual damages against Dunn's new agency, Athletes First; \$2 million in actual damages against Dunn

121. *Id.* at 8.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 10.

127. *Id.* A trade secret is defined in the Uniform Trade Secrets Act ("UTSA") as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Uniform Trade Secrets Act, Cal. Civil Code § 3426.1(d) (West 2003).

personally; punitive damages of \$20 million against Athletes First; and punitive damages of \$2.66 million against Dunn.”¹²⁸ After three and a half days of deliberation, the eight-person jury found against Dunn and Athletes First on four major issues: “breach of contract, unfair competition, tortious inducement of breach of contract and tortious interference with prospective economic advantage.”¹²⁹

Dunn’s legal woes continued on December 23, 2002, when U.S. District Court Judge Ronald Lew issued a temporary restraining order against Dunn and Athletes First, barring the agent and his firm from spending any profits.¹³⁰ Additionally, on January 3, 2003, the NFL Players Association filed a disciplinary complaint against Dunn based on testimony during the Steinberg trial.¹³¹ The complaint “alleges that Dunn violated regulations governing conduct of agents. . . .”¹³² Under NFLPA regulations, Dunn had thirty days from January 3, 2003 to answer the association’s disciplinary complaint.¹³³ Then, within seven to ten days later, the disciplinary committee would try to issue a decision as to whether there would be “no discipline, a letter of reprimand, fines, suspensions or decertification.”¹³⁴

Though Steinberg’s sizable courtroom victory and the judge’s subsequent restraining order should seemingly have a large effect on the sports agency industry and on an athletes’ right to freely select his or her representation, “[l]egal scholars say the full impact of the case might not be known until Dunn’s promised appeal is adjudicated”¹³⁵

In fact, in a decision that may prove critical to salvaging athletes’ rights when it comes to agent selection, Judge Lew denied Steinberg & Moorad’s request for a permanent injunction against Dunn.¹³⁶ Lew said that an injunction would “prevent Dunn from earning a living in a profession of his choice and prevent the athletes from enjoying the

128. See Mullen *supra* note 96.

129. Ralph Frammolino, *Sports agent Steinberg’s firm awarded \$45 Million; Jury determines that rival stole information and clients and threatened blackmail*, L.A. TIMES, Nov. 16, 2002, at 3:1, available at <http://www.latimes.com>.

130. See Liz Mullen, *Judge bars Dunn from spending profits*, Jan. 6, 2003, at <http://www.sportsbusinessjournal.com>.

131. See Frammolino, *supra* note 129.

132. Liz Mullen, *Agents: How is Dunn Getting College Stars? Jury’s Verdict Doesn’t Bother Palmer’s Father*, STREET & SMITH’S SPORTSBUSINESS J., Jan. 13-19, 2003, at 31.

133. *Id.*

134. *Id.*

135. Liz Mullen, *‘Shakespearean Drama’ could shape future of business: Steinberg is sullied but wins legal battle over protégé Dunn’s ‘betrayal’*, STREET & SMITH’S SPORTSBUSINESS J., Jan. 6-12, 2003, at 12.

136. See Ralph Frammolino, *Judge says sports agency can’t add to penalties; the court rejects Steinberg & Moorad’s motion to bar onetime partner David Dunn from representing the firm’s former clients*, L.A. TIMES, Jan. 11, 2003, at 3:2.

representation of their choice.”¹³⁷ Furthermore, Lew said that granting such an injunction would “impermissibly usurp” the NFL Players Association’s federal authority to regulate agents’ conduct.¹³⁸

F. *New York Jury Awards Damages to Another Sports Agent*

While super agents Steinberg and Dunn were battling it out in California, another client-stealing matter was resolved in the New York Supreme Court between basketball agents Eric Fleisher and his former protégé Andy Miller.¹³⁹ Fleisher, once the agent of Kevin Garnett and many other top NBA stars, filed the lawsuit in December 1999 against Miller and others for attempting to defraud him out of his agency.¹⁴⁰ With facts almost identical to the Steinberg/Dunn matter, Fleisher accused Miller, whom Fleisher had hired as an unpaid intern in 1992 and who rose to become president of the firm, of betraying him by secretly signing clients while still employed at the company; Miller left the company in July 1999, and took Fleisher’s client base.¹⁴¹

Just as the jury in Los Angeles would go on to rule in favor Steinberg, a New York jury found for plaintiff Fleisher and awarded him \$4.6 million in compensatory damages for the loss of his clients.¹⁴² Thus, as Peter Goplerud, sports law professor at Drake University Law School, said, “[t]hese are two separate juries at different ends of the country who have ruled against agents who have defected from established firms.”¹⁴³

V. CURRENT LAWS ON NON-COMPETE AGREEMENTS

Many employers, not only sports agencies, routinely utilize non-compete agreements as a method for preventing former employees from going to work for a competitor.¹⁴⁴ However, the validity and enforceability of these restrictive covenants depend entirely on the applicable state law.¹⁴⁵ This section will explore the contrast that exists between the laws of those

137. *Id.*

138. *Id.*

139. See Mike Wise, *Pro Basketball: A \$4.6 Million Judgment in a Battle of Sports Agents*, N.Y. TIMES, Oct. 17, 2002, at D5.

140. *Id.*

141. *Id.*

142. *Id.*

143. See Mullen, *supra* note 11, at 43.

144. See Kristina L. Carey, Comment, *Beyond the Route 128 Paradigm: Emerging Legal Alternatives to the Non-Compete Agreement and Their Potential Effect on Developing High-Technology Markets*, 5 J. SMALL & EMERGING BUS. L. 135, 141 (2001).

145. See E. H. Schopler, *Conflict of laws as to validity, enforceability, and effect of ancillary restrictive covenant not to compete, in contract of employment or for sale of business*, 70 A.L.R.2d 1292 (1960).

states that enforce non-compete agreements, and California, a state where non-competes are generally void. It is important to note that California law was the controlling law in the Steinberg/Dunn case. Thus, the threat of professional athletes losing their right to freely select their agents rested largely upon the jury's application and interpretation of California's restrictive covenant law.

A. *States that Enforce Non-Compete Agreements*

Many states enforce non-compete agreements, albeit with significant limitations on their scope.¹⁴⁶ Restrictive covenants are strictly scrutinized and only enforced when they are "reasonable 'in view of the totality of the circumstances, including the scope of geographical, temporal, and competitive activity restrictions.'"¹⁴⁷ Furthermore, non-compete agreements are enforceable only when drafted to protect an employer's legitimate proprietary interest.¹⁴⁸ Most of the states that enforce non-competes consider trade secrets, confidential information, customer contacts, and goodwill to be legitimate proprietary interests.¹⁴⁹

Maryland, for example, is one state where the laws permit employment agreements to contain post-employment non-compete provisions.¹⁵⁰ In Maryland, the state statutes do not themselves restrict the scope of non-compete agreements. Consequently, the legality of non-compete agreements is determined solely by common law.¹⁵¹

Under Maryland common law, such non-compete agreements are generally held to be valid, with some restrictions. Similar to the laws in other states where non-compete agreements are enforced, for a restrictive covenant to be deemed valid in Maryland, there must be adequate consideration, reasonable geographical and time limitations, and a failure to "impose undue hardship on the employee or disregard the interests of the public."¹⁵²

As previously indicated, Maryland is just one of the many states that allows non-compete agreements. Though the laws of many of these states are markedly similar, the courts within the various states have taken

146. *Id.*

147. Carey, *supra* note 144, at 142 (quoting Stephen L. Sheinfeld & Jennifer M. Chow, *Protecting Employer Secrets and the "Doctrine of Inevitable Disclosure,"* 600 PRAC. L. INST./LITIG. 367, 392 (1999)).

148. Carey, *supra* note 144, at 142.

149. See William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 37 (2001).

150. See Mark A. Kahn, *Application Group, Inc. v. Hunter Group, Inc.*, 14 BERKELEY TECH. L.J. 283, 291 (1999).

151. *Id.*

152. *Id.* at 292.

different approaches to enforcing the specific terms within an agreement.¹⁵³ Some courts employ a tactic known as “blue-penciling,” whereby objectionable terms are thrown out and the remaining reasonable provisions are enforced.¹⁵⁴ Other courts amend questionable language so that the provisions may be deemed reasonable.¹⁵⁵ And, a small number of courts take an all or nothing approach, choosing to strike any agreement that contains any unreasonable or overly broad terms.¹⁵⁶ Whichever technique is employed to enforce the specific terms within an agreement, the fact remains that a large number of states uphold non-compete agreements as valid.

B. California’s Prohibition Against Non-Compete Agreements

Unlike a great majority of the states, California has been a strong proponent of employee mobility, and thus has been extremely reluctant to enforce covenants not to compete.¹⁵⁷ The courts have strictly adhered to California Business and Professions Code Section 16600, which has been in place since 1872 and provides “[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”¹⁵⁸ Repeatedly applying Section 16600, the California courts have detailed the state’s strong public policy “to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.”¹⁵⁹ Consequently, the accepted rule in California is that non-compete agreements are void as a matter of law.¹⁶⁰

California courts have justified their decision to favor an employee’s right to pursue any livelihood he or she chooses over an employer’s competitive business interests by claiming that greater employee mobility benefits the state’s employers and employees alike.¹⁶¹ The courts make the point that while being able to switch jobs freely represents an obvious advantage for employees, the employers’ ability to have access to the finest potential employees without restriction is a similarly valuable tool in the marketplace.¹⁶²

153. See Carey, *supra* note 144, at 142-43.

154. *Id.*

155. *Id.* at 143.

156. *Id.*

157. See J. Caleb Donner and Lori Donner, *Are Non-Compete Agreements Enforceable?*, (Jan. 29, 2003), at http://www.donnerlaw.com/new_page_5.htm.

158. CAL. BUS. & PROF. CODE § 16600 (West 2003).

159. KGB, Inc. v. Giannoulas, 164 Cal. Rptr. 571 (Cal. Ct. App. 1980).

160. See Donner, *supra* note 157.

161. See Kahn, *supra* note 150, at 290.

162. *Id.*

In fact, the state's prohibition on non-competes has been widely recognized as one of the driving forces behind the rapid growth of Silicon Valley.¹⁶³ Through both informal and formal networking, Silicon Valley employees often receive offers to switch jobs, and as a result, companies located there have abnormally high turnover rates compared to the rest of the country.¹⁶⁴ Though critics view employee turnover as a detriment to employers, proponents of California's hard stance against restrictive covenants maintain that Silicon Valley companies have derived a two-part benefit as a result of greater employee mobility: "1) employers can seek to employ anyone and directly derive benefits from the new employees; and 2) more senior employees learn from their recently hired colleagues and become more efficient and productive."¹⁶⁵

C. *Exceptions to California's Prohibition on Non-Competes*

While California has remained steadfast in its prohibition of non-compete agreements, there are some narrow exceptions to the state's otherwise broad ban and exceedingly strong public policy against such covenants.¹⁶⁶

Statutorily, Sections 16601 and 16602 of California's Business and Professions Code provide exceptions permitting the enforcement of non-compete agreements where there is either a sale of a business or of a partnership interest.¹⁶⁷ Courts have construed these exceptions narrowly, applying them only in situations where a business or partnership is being sold as the primary function of a transaction.¹⁶⁸ The courts have limited their use of Sections 16601 and 16602 as a protection against parties that attempt to avoid the "broad ban on anticompetitive covenants by including insubstantial stock or partnership sales as part of the employment transaction through application of the 'sham covenant' doctrine."¹⁶⁹

In addition to the limited statutory exceptions, California courts have established two additional exceptions whereby non-compete agreements will be enforced. The first such exception arises when the restrictive covenant reflects only a narrow restraint on competition.¹⁷⁰ The seminal

163. *Id.* at 290-91.

164. *Id.*

165. *Id.* at 291.

166. See Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 15 (2000).

167. *Id.*

168. *Id.*

169. *Id.*

170. See *Walia v. Aetna, Inc.*, 113 Cal. Rptr. 2d 737, 743 (Cal. Ct. App. 2001).

case that established this “narrow restraint” exception is *Boughton v. Socony Mobil Oil Co.*,¹⁷¹ where the court held that the language in a deed to the plaintiff’s property, which prohibited the plaintiff from using the property for dispensing petroleum products for twenty years, was not in violation of Section 16600.¹⁷² The court determined that the restriction was a restraint on the use of land and not a limitation on the plaintiff’s ability to carry on a trade or business.¹⁷³ The *Boughton* court additionally noted that restrictions on pursuing “only a small or limited part of a business, trade or profession” were similarly not violations of Section 16600.¹⁷⁴

Furthermore, in the recent case *Walia v. Aetna, Inc.*,¹⁷⁵ the California Court of Appeals held that a non-compete covenant prohibiting an Aetna employee from accepting a job as a salesperson for any other healthcare company in California did not fall under the “narrow restraint” exception.¹⁷⁶ Though the central issue in that case was whether the employee was wrongfully terminated for refusing to sign the restrictive covenant, the court, nonetheless, spent much of its discussion determining that the covenant was unenforceable despite Aetna’s reference to California’s narrow restraint exception.¹⁷⁷

The second non-statutory exception to California’s prohibition against non-compete agreements, and perhaps the greatest threat to an athlete’s right to freely choose his or her agent, arises in instances where the restrictive covenant is required to protect an employer’s trade secrets.¹⁷⁸ In an early case dealing with this exception, the California Supreme Court enforced a non-compete agreement that prohibited a “weekly credit” salesperson from divulging the names of former customers to a subsequent employer or from soliciting those customers.¹⁷⁹ The court determined that the restraint did not violate Section 16600 because the agreement “did not prevent defendant from carrying on a weekly credit business or any other business. He merely agreed not to use plaintiffs’ confidential lists to solicit customers for himself for a period of one year following termination of his employment. Such an agreement is valid and enforceable.”¹⁸⁰

The “trade secrets” exception is limited, however, because California courts have established that non-compete provisions which do not specifically refer to trade secrets will be declared void and in violation of

171. 231 Cal. App. 2d 188 (1964).

172. *Id.* at 190-91.

173. *Id.*

174. *Id.* at 192.

175. 113 Cal. Rptr. 2d at 737.

176. *Id.* at 743.

177. *Id.* at 743-44.

178. *See Walia*, 113 Cal. Rptr. 2d at 745.

179. *See Gordon v. Landau*, 321 P.2d 456 (Cal. 1958).

180. *Id.* at 459.

Section 16600.¹⁸¹ Additionally, when employers address trade secrets elsewhere in the employment agreement, the courts have enforced only the trade secret clause and have thrown out the non-compete language.¹⁸² Thus, an employer's mere belief or intention that its non-compete agreement would prevent employees from divulging confidential information to subsequent employers cannot change a generally illegal agreement into an enforceable agreement to protect trade secrets.

All in all, despite the exceptions, California has remained steadfast in its unwillingness to enforce non-compete agreements. Thus, the question must be asked: did the Steinberg/Dunn jury misapply California's generally employee-friendly restrictive covenant law when it awarded Steinberg \$44.66 million in damages for Dunn having breached his non-compete agreement?

VI. CONCLUSION

Professional athletes have long held the right to freely select their representation. However, the changing economics of the sports agent business, especially as a result of the consolidation that swept the industry, have threatened to take away that liberty. A byproduct of the newly created "super agencies" has been the inclusion of non-compete clauses in the employment contracts sports agents sign with their firms,¹⁸³ and with the courts recently upholding such clauses, an athlete's right to choose might become compromised.

The Los Angeles jury's finding that agent David Dunn breached his employment contract (and, essentially, the non-compete agreement contained within it) has already led many to believe that a certain sense of stability will take hold in the athlete agency industry. Though the full impact will not be realized until Dunn's appeal is adjudicated, the jury's "verdict is likely to prevent some agents from leaving firms and taking clients."¹⁸⁴ If there becomes less of a risk of agent employees leaving and taking clients, many predict that owners of sports agencies will feel more protected and that the trend of lucrative agency acquisitions will continue.¹⁸⁵ As Tom Reich, founder of baseball firm Reich, Katz and Landis, said: "Sports groups should have the right to protect themselves from people walking out the door with the clients of the firm If people want to leave, let them get their own clients. This is a tough enough

181. See *Walia*, 113 Cal. Rptr. 2d at 745.

182. *Id.*

183. See Complaint, *supra* note 10.

184. See Mullen, *supra* note 132.

185. See Mullen, *supra* note 11.

business as it is.”¹⁸⁶

On the other hand, perhaps agency owners should not rest so easily. And perhaps athletes should not be so afraid that their longstanding right to select the agent of their choice has come to an end. Though the *Steinberg* and *Fleisher* decisions did punish agents for leaving their firms and stealing clients away, both cases have pending appeals.¹⁸⁷ Once judges get a hold of the cases, especially in the *Steinberg/Dunn* matter, perhaps there will be, at least in a legal sense, a different outcome. Sure, it seems like Dunn should remain punished for his elaborate scheme to leave *Steinberg* and steal his old mentor’s entire football practice; however, the jury may have misapplied California’s restrictive covenant laws.

California has been extremely reluctant to enforce covenants not to compete.¹⁸⁸ Thus, when the legal question of the enforceability of restrictive covenants goes before a judge, rather than an understandably sympathetic jury, the outcome may be different. Then again, such an outcome is not so predictable because there are exceptions to California’s prohibition against non-compete agreements.

The most applicable exception to California’s prohibition on restrictive covenants arises when such anticompetitive pacts are required to protect an employer’s trade secrets. As was discussed in Part V, this is a limited exception whereby the California courts have been unwilling to enforce those non-compete provisions that do not directly mention trade secrets.¹⁸⁹ In the non-compete clauses of Dunn’s employment agreement, available for purposes of this paper, trade secrets are not explicitly mentioned, as the language seems to suggest a much broader anticompetitive covenant.¹⁹⁰ Furthermore, whether SMD directly addressed trade secrets elsewhere in the employment agreement is unclear. When employers have done so in the past, California courts have enforced only the trade secret language and held the more general non-compete clauses to be void.¹⁹¹

If the appellate judge cannot determine that the non-compete clauses contained within Dunn’s employment agreement satisfies the trade secrets exception, or any of the other exceptions to California’s prohibition against non-compete agreements, the judge probably will deem the restrictive covenant unenforceable. Such an outcome in Dunn’s favor is not inconceivable, especially given U.S. District Court Judge Ronald Lew’s January 8, 2003, decision denying *Steinberg* and *Moorad*’s request for a

186. *Id.* at 43

187. See *Mullen*, *supra* note 96; *Wise*, *supra* note 137.

188. See *Donner*, *supra* note 156.

189. See *Walia*, 113 Cal. Rptr. 2d at 745.

190. See *Complaint*, *supra* note 10, at 16-17.

191. See *Walia*, 113 Cal. Rptr. 2d at 745.

permanent injunction against Dunn.¹⁹² In that ruling, Judge Lew refused to “prevent Dunn from earning a living in a profession of his choice and prevent the athletes from enjoying the representation of their choice.”¹⁹³

Thus, as recognized by a federal judge, an athlete’s right to enjoy the representation of his or her choice might continue even where a jury finds the chosen agent and his firm liable for nearly \$45 million in damages and for breach of contract for having stolen clients from the agent’s former firm.¹⁹⁴ Just ask the 2002 Heisman Trophy winner Carson Palmer,¹⁹⁵ the number one overall pick in the 2003 NFL draft. He and other college football standouts, Dave Ragone, Brandon Lloyd and Jason Gesser, have all hired Dunn as their agent despite both Dunn’s legal troubles and the disciplinary complaint filed by the NFLPA.¹⁹⁶ Accordingly, it appears that professional athletes will, at least for now, continue one of the most important things they have long been able to do: choose their own sports agent.

192. See Mullen, *supra* note 132.

193. *Id.*

194. See Mullen, *supra* note 97.

195. See *Palmer Wins Heisman, and It’s Not Even Close*, HOUSTON CHRON., Dec. 15, 2002, Sports, at 1. The Heisman Trophy is the most prestigious award in college football. It is awarded each December to the most outstanding college player in the country.

196. See Mullen, *supra* note 132.